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Financing of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994

Comprehensive report on the progress made by the International Criminal Tribunal for Rwanda in reforming its legal aid system

Report of the Secretary-General**

Summary

The General Assembly, in its resolution 57/289 of 20 December 2002, requested the Secretary-General to submit a comprehensive report on the progress made by the International Criminal Tribunal for Rwanda in reforming its legal aid system, particularly with regard to rationalizing the costs of defence counsel and establishing indigence, to the Assembly at its fifty-eighth session.

The present report is submitted pursuant to that request and outlines the reforms implemented by the Tribunal to improve its legal aid system.

* A/58/150.

** The document was submitted late to the conference services without the explanation required under paragraph 8 of General Assembly resolution 53/208 B, by which the Assembly decided that, if a report is submitted late, the reason should be included in a footnote to the document.

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I. The legal/procedural background

1. Cognizant of the need to ensure fair trials and in particular to comply with article 20 of the Statute, the International Criminal Tribunal for Rwanda through the Registrar has put in place a legal aid programme in order to provide indigent accused/suspect persons with adequate resources to prepare their defence. The present report is submitted pursuant to the request of the General Assembly to the Secretary-General in resolution 57/289 of 20 December 2002 to prepare a comprehensive report on the progress made by the Tribunal in reforming its legal aid system.

II. Prior to the adoption of General Assembly resolution 57/289

A. Reforms related to the eligibility to the legal aid programme

2. The Tribunal's legal system is based on the principle that each accused shall be entitled to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay. From 1996 when the first accused persons were transferred to the Tribunal to late 1998, eligibility for the legal aid programme was automatically granted to applicants pending the outcomes of investigations on their assets and no threshold was defined. Accused persons applying for the legal aid programme had to fill in a form entitled "Request for assignment of counsel", which detailed their assets and the Registrar assigned counsel from the list of potential counsel set forth in article 45 of the rules of procedure and evidence.

3. Despite the absence of in-house specialized expertise in the area of financial investigation, a number of actions were taken by the Registrar to ascertain the wealth of accused claiming eligibility under the legal aid programme. Thus, in 1997 a team of Tribunal security officers met with officers at a Nairobi-based bank to review the accounts of a detainee, exchanges were made with the Belgian authorities in order to gather information on the assets of some detainees arrested in Belgium, and ad hoc arrangements were put in place with the tracking team of the Office of the Prosecutor requesting it to share with the Registry any information collected during their investigations regarding the financial wealth of detainees. Unfortunately, none of these arrangements were as fruitful as one would have expected.

4. As a result, there was no threshold for indigence and accused persons benefited in full from the legal aid programme.

5. A threshold for indigence was defined in 2001 in relation to the cost of a trial before the Tribunal. Taking into consideration that the average defence costs of a trial before the Tribunal are very high and in order to avoid hindrance in the preparation of the cases accused persons who were found by the Registrar not to have sufficient means to engage a defence counsel and were therefore indigent were declared eligible for the legal aid programme. Indeed, the Registrar had no evidence of the ability of the accused persons to afford the cost of their legal representation before the Tribunal, which comes to an average of $US 740,000. That amount was

then considered as being the threshold for indigence pending further reflection and elaboration on the issue.

B. Reforms related to the assistance provided to defence teams under the Legal Aid Fund

6. When the Tribunal began operations in 1995 there was no established system of legal aid. On the basis of an extensive interpretation of article 14 of the Tribunal's Statute, which provided that the Tribunal should adopt, for the purposes of proceedings before the Tribunal, rules of procedure and evidence for the conduct of pre-trial stage of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Criminal Tribunal for the Former Yugoslavia with such changes deemed necessary, it was initially decided to remunerate assigned counsel a daily amount of $200 which was then the practice in the Yugoslavia Tribunal. In December 1996, after consultation with the President, the Registrar decided to remunerate defence counsel on an hourly basis with a ceiling of 175 hours payable per month. This new system was similar to the system that had been adopted by and was applicable to the Yugoslavia Tribunal. In addition, the fixed rate set forth by article 22 of the Directive on the Assignment of Defence Counsel and payable at the end of each stage of the proceedings (pre-trial/trial/appeal) was fixed at $400. The remuneration of supporting defence team members (investigators/assistants) was decided on a case-by-case basis. It should be noted that once accepted as indigent, accused are provided with a defence team composed of one lead counsel, one co-counsel and three supporting staff (two investigators and one legal assistant or two legal assistants and one investigator).

7. On 2 April 1998, the Registrar convened at Arusha a meeting of the advisory panel contemplated in article 29 of the Directive on Assignment of Defence Counsel to review, inter alia, the issue of remuneration of defence counsel under the legal aid programme. Based on the recommendations of the advisory panel, a consolidated guideline for the management of defence counsel's intervention under the legal aid programme was put in place on 1 September 1998. The guideline was issued in the framework of the permanent process of maintaining a sustainable legal assistance programme through improved assistance to defence teams and was aimed at rationalizing the management of the limited resources available.

8. As a result, the system of an hourly rate based on counsel's experience[1] with a ceiling of 175 hours monthly billable was maintained, the fixed rate of $400 paid at each stage of the proceedings to cover the time spent by counsel to familiarize themselves with the relevant case documents and the applicable law was increased to $2,000 and the condition of remuneration of supporting defence teams (investigators and assistants) was defined and standardized. And, in lieu of the remuneration on a case-by-case basis previously in place for defence investig tors and legal assistants, it was decided that they would be remunerated at an hourly rate of $25, with a ceiling of 100 hours per month. Further, the written authorization of the Registrar became compulsory prior to any official travel of defence team members, and the duration of travel to Arusha for hearing purposes was limited to

[1] For counsel with 10 to 14 years' experience the hourly rate is $90, for those with 15 to 19 years' experience it is $100 and for those with 20 or more years' experience it is $110.

the extent necessary. Previously, defence team members had discretion to determine the length of their stay in Arusha. In addition and in accordance with article 15 of the Directive it was decided that the assignment of co-counsel was no longer automatic. Such assignment would then occur only in exceptional circumstances where the bulk of work so justified.

9. In September 2000, following an evaluation of the legal aid programme and in order to further improve efficiency, transparency and uniformity while taking into consideration the need for a rational management of the available funds, the measures relative to the enforcement of the Directive on the Assignment of Defence Counsel and related co-counsel, reimbursement of travel expenses and defence investigators were reviewed. As a consequence, the time frame of the co-counsel's intervention was altered and it was decided that, instead of an assignment at the early stage of the proceedings as was the practice, such an assignment should be made 60 days prior to the commencement of the trial and run only for the duration of the trial on the merits. During the appeal stage, the co-counsel should be assigned 30 days or so prior to the hearing of the appeal in open court.

10. Similarly, in order to reduce the heavy financial burden of defence travel costs on the legal aid fund, and contrary to the previous practice whereby both the lead counsel and the co-counsel were allowed to attend hearings on pre-trial motions, it was decided that during the pre-trial phase either the lead counsel or the co-counsel but not both should be authorized to travel for hearing purposes. In addition, the number of visits to Arusha by the lead counsel during the pre-trial stage was limited to three visits apart from hearing purposes and not more than two coordination meetings in Arusha with all his or her team. Prior to this reform, the lead counsel was allowed unlimited visits during the pre-trial stage. It has been noted that breaks during trial proceedings could contribute to increased travel costs. In view of the complexity of the cases at the Tribunal, experience has shown that it is almost unavoidable to have breaks in between different phases of the proceedings, especially during lengthy trials. However, the Tribunal will continue to keep these breaks to a minimum. Lastly, during the appeal stage, the appointment of one investigator is authorized only if the lead counsel submits a duly justified request including, inter alia, the specific assignment for which the person is required as well as the estimated time of duration of the work.

11. In the meantime, in an attempt to address the phenomenon of "excessive lawyering" described in the report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda (A/56/853), which consists of purposely generating more legal activity than is required in order to justify claims for higher remuneration from the Tribunal, rule 73 of the rules of procedure of evidence relating to the filing of motions was amended at the judges' plenary meeting in February 2000 and a new section (E) added to allow chambers to impose sanctions against counsel if they bring a motion, including a preliminary motion, that, in the opinion of the chamber, is frivolous or is an abuse of process. Such sanctions include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof. Several decisions have been adjudicated on this ground and a recovery of the fees and/or expenses has always been carried out accordingly by the Registry in compliance with such court orders.

12. In January 2001, with the view of introducing more flexibility in the use of the co-counsel by the accused's teams, it was decided that the previous restriction on the date when the co-counsel might commence work preparatory to the trial should no longer be in force. Instead, the co-counsel's assignment runs for the period commencing with the date of the assignment and terminates at the conclusion of the substantive trial proceedings. In addition, the co-counsel is allocated an allotment of 250 hours of work on the case as well as a working visit to Arusha to hold a case conference with the accused and/or other members of the defence team in order to be familiarized with the case. After the familiarization period, the cost of co-counsel's representation is met under the legal aid programme at the commencement of the substantive trial proceedings at an hourly rate of $80 with a monthly ceiling of 175 hours. The fixed rate of $2,000 is paid to the co-counsel for the trial stage only. For the appeal stage, in the event that the co-counsel is assigned, an allotment of 350 hours is granted for the duration of the appeals proceedings. The Registrar may increase the allotment if he or she is persuaded that such additional allotment is reasonable and necessary in all the circumstances of the case.

13. Following indications that there might be abuses of the legal aid programme and a subsequent report of the Office of Internal Oversight Services (A/55/759), the Registrar constituted a review panel on the Tribunal's legal aid scheme on 13 June 2001.

14. The mandate of the review panel was to review the legal aid scheme of the Tribunal and make recommendations to the Registrar on how the legal aid system might be improved to ensure efficient use of available resources and the protection of the integrity of the Tribunal's judicial process.

15. In its report issued on 11 July 2001, the review panel, taking into account areas of priority in the light of operational experience, concentrated on the recruitment of defence investigators/assistants in order to address the alleged abuse of the legal aid system through the appointment of friends or relatives of the accused persons in their defence teams.

16. As a result of the review panel's recommendations, the vetting process for defence support staff has been improved and since then every counsel who wishes to hire an investigator has to submit a composition of defence team form detailing the academic and professional background of the prospective investigator. The file is then sent to the Tribunal's Security Section in Kigali for background screening.

17. In addition, the prohibition of fee-splitting between counsel and their clients which had been adopted in the code of conduct of counsel appearing before the Tribunal by the judges' plenary held in July 2002[2] was extended to defence

[2] Article 5 bis of the code of conduct reads as follows:

"1. Fee-splitting arrangements, included but not limited to financial arrangements between Counsel and their clients, relatives and or conduit of their clients are not permitted by the Tribunal.

2. Where Counsel are being requested, induced or encouraged by their clients to enter into fee splitting arrangements, they shall advise their clients on the unlawfulness of such practice and shall report the incident to the Registrar forthwith.

3. Counsel shall inform the Registrar of any alleged fee splitting arrangement by any member of his Defence team or any other Counsel.

investigators/assistants. This was done by way of adding a clause in the composition of defence team form[3] which must be agreed to by the lead counsel prior to the appointment being made.

18. Subsequent to these recommendations, the review panel recommended on 29 August 2002 that an external expert consultant (or a pool of two to three consultants) be brought in and tasked with reviewing the systems that had been in place thus far in the Tribunal for the management of the remuneration component of its legal aid scheme and the proposed matrix system designed by the Defence Counsel Management Section of the Tribunal. The recommendations expected from the consultant(s) were to take into account existing assessment systems in national and/or international jurisdictions as well as the unique characteristics of the Tribunal's environment.

19. As a result, on 26 September 2002, the Registrar sought assistance from two Governments for experienced consultants in the field of legal fees. In addition to the approach to these Member States, contact was established with potential experts from another country (who subsequently became unavailable within the required timescale). The terms of reference of the consultancy covered all the areas of concern that might lead (in accordance with para. 15 (C) of General Assembly resolution 57/289) to a better management, monitoring and control of the expenses of the legal aid system. The terms of reference were as follows:

(a) Provide a working definition of what amounts to sufficient means below which an accused/suspect can be considered as indigent or partially indigent;

(b) Develop a formula under which the Tribunal would be able to determine the contributions to be made by an accused/suspect person who partially qualifies for legal aid;

(c) Consider and advise on whether in view of the international character of the Tribunal, the recommendation of the United Nations Board of Auditors to the Registrar that he should take into consideration cost reduction factors by appointing counsel residing in the close proximity to the headquarters of the Tribunal is viable;

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4. Following receipt of information regarding possible fee splitting arrangements between Counsel and their clients, the Registrar shall investigate with due process such information in order to determine whether it is substantiated."

5. Where Counsel is found to have engaged in a practice of fee splitting or to have entered into a fee splitting arrangement with his client, the Registrar shall take action in accordance with article 19 (A) (iii) of the Directive on the Assignment of Defence Counsel.

6. In exceptional circumstances, and only where the Registrar has granted leave, Counsel may provide their clients with equipment and materials necessary for the preparation of their defence.

[3] The clause reads as follows:

"I certify on my honour that the above information is true and correct to the best of my knowledge and belief and that I have verified its contents. I understand that the information I have given herein forms the basis of the approval of the request for my appointment, under the programme of legal aid, as a defence team member. I undertake not to enter into any fee-splitting arrangement with any detainee of the Tribunal or relative/friend/associate of the same and to inform forthwith the Registrar on any such request put to me or members of the defence team. I agree that should any of the matters I have stated herein prove to be incorrect or false and/or my undertaking not complied with the Tribunal will have the liberty to terminate this appointment without notice."

(d) Advise on the development of a viable and coherent system of payment of defence team members under the programme of legal aid of the Tribunal. The proposed system should make the defence fees and expenses more predictable and easier to budget and justify;

(e) Advise on the development of internal mechanisms which would be effective in curbing exaggerated or false claims by defence team members and ensuring that the payments made under the legal aid system are paid only for reasonable work that is necessary for the defence of the accused in answering the specific charges before the Tribunal;

(f) Propose a staffing level of those in charge of implementing the system of payment proposed by the Defence Counsel Management System and provide appropriate training to those staff;

(g) Propose an integrated computerized system to monitor and control the travel of defence teams members and other requests such as the presence of investigators and assistants in Arusha;

(h) Advise on a computerized system for the follow-up of requests for payment and collation of statistics.

20. The terms of reference of the Tribunal's consultancy were articulated with a view to getting from the consultant a draft system of payment under the legal aid programme addressing all the concerns of General Assembly resolution 57/289. Indeed, it was the Tribunal's opinion that these terms of reference would allow the consultancy to devise recommendations dealing with the efficient management, monitoring and control of the legal aid programme. The results of the consultancy are dealt with later in the present document.

C. Reforms related to the safeguard of the integrity of the judicial process

21. In view of developments involving the arrest of a suspect who was a defence investigator under the legal aid programme, and having due consideration to the findings and recommendations of the Office of Internal Oversight Services report dated 1 February 2001 (A/55/759) the Registrar issued a public statement on 13 June outlining the following measures to protect the integrity of the Tribunal's judicial process:

(a) The submission by individuals who are hired by defence counsel as defence investigators of forms requiring more detailed information about the backgrounds of such individuals to ensure, among other things, that they are not related to accused persons detained by the Tribunal;

(b) The strengthening of the screening process of potential and serving defence investigators to ensure that no members of defence teams obtain positions under false pretences with regard to identity or have engaged in activity incompatible with the purposes of the Tribunal;

(c) Restrictions on the giving of gifts by defence teams to their clients;

(d) Strict personal searches of persons visiting or meeting with detainees in the United Nations detention facilities in accordance with rule 61 of the Tribunal's rules of detention;

(e) Restrictions preventing members of defence teams from meeting with accused persons other than their own clients while visiting United Nations defence facilities.

III. Subsequent to the adoption of General Assembly resolution 57/289

22. After the adoption of General Assembly resolution 57/289, and with the aim of collecting more reliable information to be integrated into the process of settlement of a new system of payment, a staff member of the Defence Counsel Management Section carried out a mission to the Office of Legal Aid and Detention Matters of the International Criminal Tribunal for the Former Yugoslavia from 6 to 28 February 2003. The principal objective of the mission was to study the legal aid programme and the new payment system of the Office of Legal Aid and Detention Matters. The specific objectives were to compare the system of payments of the Defence Counsel Management Section with the new payment system implemented by the Office of Legal Aid and Detention Matters known as the "lump sum system" and propose more cost-effective measures where possible aimed at curbing the Rwanda Tribunal's escalating defence costs.

23. It is clear from a study of the legal aid system in place at the Yugoslavia Tribunal that it is based on sound principles, with which the Rwanda Tribunal entirely agrees, namely:

(a) The accused is entitled to legal aid if he is partially or fully incapable of paying for his defence;

(b) Only necessary and reasonable expenses for the criminal defence are remunerated;

(c) The legal aid system requires defence to be efficient in its management of cases;

(d) The legal aid system must be able to attract defence counsel of good quality and standing, and with skills at a level comparable to the senior trial attorneys and trial attorneys working in the Tribunal's Office of the Prosecutor.

24. The system at the Yugoslavia Tribunal has been refined over a number of years in the light of experience, culminating in the present system which is detailed in its report to the General Assembly dated 12 August 2003 (A/58/297). The Rwanda Tribunal consultant had reservations about that system and did not recommend that the Rwanda Tribunal adopt it. The Yugoslavia Tribunal itself refers in its report to a number of problems that have arisen. Issues related to predictability and cost containment still dodge the system at the Yugoslavia Tribunal as the May 2003 report states. The new system at the Yugoslavia Tribunal is not yet accepted by the defence lawyers. The Association of Defence Lawyers (ADAD) at the Rwanda Tribunal has also made clear in a strongly worded memorandum to the Registrar of the Rwanda Tribunal that they object to any changes being introduced to the system with retroactive effect and/or without prior consultation with them. The Rwanda

Tribunal has agreed with the observations and recommendations of the Consultant on this matter and will not be adopting the Yugoslavia Tribunal system for the time being.

25. However, and for all practical purposes, it became judicious to institute an enabling provision in the rules of the Rwanda Tribunal that would permit its possible adoption of a lump sum system. This was done through an amendment of article 22 of the Directive on the Assignment of Defence Counsel by adding a new section (C). The new article 22 (C)[4] adopted during the judges' plenary held in May 2003 provides the Registrar with a fee-payment mechanism that could lead to reductions in costs as well as greater predictability for budgetary purposes. At the same time, the wording of the article 22 (C) allows flexibility should trials be of substantially shorter or longer duration than originally estimated.

26. Further to the study of the Yugoslavia Tribunal system, the Rwanda Tribunal engaged a consultant on 5 May 2003 to look into the problem.

27. While the consultancy was in progress and pending the implementation of a completely new system, the Defence Counsel Management Section instituted a number of important measures in order to monitor and control the upward trend of defence costs. These measures are as follows:

(a) All lead counsel are requested to provide a plan of action explaining the tasks of investigators/assistants for the pre-trial stage based, inter alia, on the disclosure made to them by the Office of the Prosecutor. This allows the Defence Counsel Management Section to better assess the reasonableness of travel requests and may reduce the number of trips;

(b) Lead counsel whose cases are still at the pre-trial stage are requested to confirm that they have put in place an agreed defence strategy with the accused. This will avoid requests for withdrawal of counsel based on a disagreement in the defence strategy. The disagreement in defence strategy seems to be used by accused as a panacea to obtain the withdrawal of their counsel when there seems to be no valid reason to withdraw counsel;

(c) Two investigators are not granted automatically to defence teams at the pre-trial stage. This may reduce the number of defence team members as well as travel;

(d) The possibility of over-billing is addressed by a tighter assessment of the reasonableness of hours charged by defence team members. In this regard a new system of reasonable time under the legal aid programme was introduced. This allows the Defence Counsel Management Section staff to approve for payment only the number of hours a defence team member is expected to spend on a given activity

[4] Article 22 (C) reads as follows:

"The Registrar, with the concurrence of the President, may establish an alternative scheme of payment based on a fixed fee ('lump sum') system consisting of a maximum allotment of moneys for each defence team in respect of each stage of the procedure taking into account the Registrar's estimate of the duration of the stage and the apparent complexity of the case. In the event that a stage of procedure is of substantially longer or shorter duration than estimated, the Registrar may adapt the allotment, whether by increasing or decreasing it. In the event of disagreement on the quantum of the maximum allotment, the Registrar shall make a decision, after consulting the Chamber and, if he deems necessary, to do so, the Advisory Panel."

and not the number of hours actually charged by the defence team member. This may entail strengthening the Defence Counsel Management Section with experienced personnel in matters of taxation of legal fees for and efficient and objective assessment of the reasonable time;

(e) In cases where it is observed that investigators are systematically submitting claims for fees that amount to the maximum number of hours, the Defence Counsel Management Section requests the counsel to submit copies of reports, mission reports or similar pertinent documents justifying such claims. This applies also to activities related to witness statements. This is done pursuant to article 11 of the code of professional conduct for the defence, which provides as follows: "Counsel should account in good faith for the time spent on working on a case and maintain and preserve detailed records of time spent. Counsel is under a duty to set his bills and fees with moderation";

(f) Reminders are sent to defence team members that they must submit their claims on a monthly basis. This will allow the Defence Counsel Management Section to have a better idea of the current status of its obligations and expenditures;

(g) The Defence Counsel Management Section is concentrating assistance on cases that are in trial. Cases at the pre-trial stage are closely monitored in order to ensure that only necessary and reasonable work for that stage is authorized.

28. On 5 July 2003, the consultant submitted his report (see annex I to the present report). The report may be fairly summarized as stating that both of the systems in place at the Rwanda and Yugoslavia Tribunals are flawed and open to abuse (notwithstanding the fact that no evidence of actual abuse has been found). The consultant recommended the following:

(a) The appointment of a team of up to four people who are independent of both the Rwanda and the Yugoslavia Tribunals, to be responsible for the assessment of the defence team's costs claim. The team would audit the defence team's costs and have access to the defence team's papers;

(b) The assessment of claims by all members of a defence team by one person at the same time;

(c) The assessment by one person of claims of all defence teams where more than one suspect is tried at the same time;

(d) The hearing of motions at the Rwanda Tribunal be dealt with in writing or by video link;

(e) The Office of the Prosecutor address problems of late disclosure of evidence;

(f) The reduction or abolition of the monthly allowance of 175 hours;

(g) The submission of more detailed information by lead counsel when requesting authorization of co-counsel, legal assistants and investigators;

(h) That consideration be given to making lead counsel responsible for all costs incurred by the defence teams;

(i) The appointment of a financial investigator at the Rwanda Tribunal;

(j) That the investigator who arrests a suspect supply information to the financial investigator on the suspect's circumstances at the time of arrest;

(k) That consideration be given for Chambers hearing a case to make a recovery of defence costs order at the end of the case;

(l) That the threshold for indigence be fixed at $10,000;

(m) The allocation of lower grade fee earners to interview suspects;

(n) The restriction of the lists of lead counsel, co-counsel, legal assistants and investigators to persons who reside in Africa or that all co-counsel, legal assistants and investigators are from Africa;

(o) The establishment of a variable hourly rate based on the place of residence of the defence team;

(p) The establishment of a contract system;

(q) The establishment of a payment on account system;

(r) The establishment of an appeal procedure for dissatisfied defence team members.

29. It should be noted that the report did not recommend a single system; alternative systems have been recommended.

IV. Final reforms undertaken after the consultancy

30. Of these recommendations, recommendations (d), (g), (h), (i) and (r) are already in place. It should be noted that, following an amendment to the rules of procedure and evidence in July 1999, a practice of deciding motions on brief and thereby dispensing with oral hearings has developed. In recent years, almost all the pre-trial motions have been decided on brief. A "video link" project is being implemented by the Tribunal to operate between The Hague, Arusha and Kigali and will be in operation by November 2003 (recommendation (d)). In addition, the setting up of an appeal procedure for dissatisfied defence team members (recommendation (r)) is already governed by article 30 of the Directive on the Assignment of Defence Counsel, the recruitment of a financial investigator (recommendation (i)) is being implemented with the expected arrival of the incumbent in mid-September 2003. When making a request of co-counsel, legal assistant or investigator (recommendation (g)) the lead counsel is required to submit detailed information in support of the request. However, in view of the completion strategy, the President's approach is to have both the lead counsel and the co-counsel assigned to the defence team before the beginning of the trial so that once a trial starts momentum will not be lost. In accordance with article 15 (E) of the Directive of the Assignment of Defence Counsel, the lead counsel is already recognized as the individual responsible for the defence team (recommendation (h)).

31. In addition to the above reforms, the Tribunal has put in place the following as a result of the Consultant's recommendations.

32. Prior to the consultancy, the lead counsels were submitting claims for their team members separately and their assessments were made by different staff members of the Defence Counsel Management Section. In addition, for joint cases,

the defence claims were assessed without comparing the work undertaken and charged by the other defence teams involved in the case. As a result of the implementation of recommendations (b) and (c), the following measures entered into force:

(a) Monthly claims by all members of a defence team are assessed by one person at the same time. The benefit is to allow an overview of the claims for work done by the whole of the defence team and thus to enable cross-checking of claims. The cross-checking will facilitate the checking and controlling of the incidence of duplication of claims submitted, if any, for the same work carried out by different members of the same defence team and also afford the Section the chance to assess the reasonableness of the work carried out during a particular period and stage of a case (see annex II to the present report);

(b) Where more than one suspect is tried in the same proceedings (joinder of accused) costs of all defence teams are assessed by one person at the same time. The benefit is that claims of lawyers representing co-accused can be cross-checked one against the other. Thus, for example, it may become apparent that one legal team's billing is disproportionate to that of other teams in the same case. It is important to point out here that it may not always be possible to do this because there can be legitimate reasons for different teams to bill at different times of the year during the pre-trial preparatory stage (see annex II).

33. Prior to the consultancy, the Tribunal, on the basis of nine cases already completed, had determined that the average defence cost for each trial amounted to approximately $740,000. The cost includes fees and travel-related expenses paid to the defence teams during the pre-trial, trial and appeal stages. The Tribunal considered this amount as being the financial threshold in determining whether the suspect or accused is indigent or not. Therefore suspects or accused persons whose assets were below this threshold qualified for legal aid. In the reform, following the consultant's recommendation (l) there is a major reduction from this threshold. The consultant recommended the amount of $10,000. The recommendation has been put in place and will lead to substantial savings. Persons with assets over that sum will be required to make a financial contribution to the cost of their legal aid. Persons with assets over $740,000 will be required to bear the costs of their legal representation to the extent of their assets.

34. As a result, the Registry has worked out a formula to determine the share of the Tribunal to the cost of the judicial proceedings (pre-trial/trial/appeal stages) of the partially indigent accused. The formula takes into consideration the estimated defence costs of the judicial proceedings and the accused's financial capacity, which represents the value of property available to the accused and/or members of his or her family with whom he or she resides, that is, his or her net worth. The share of the partially indigent accused to the cost of the judicial proceedings is his or her net worth less the threshold of $10,000. Therefore, the share of the Tribunal would be the excess of the estimated cost of the judicial proceedings over the net worth of the partially indigent accused.

35. Settlement of the cost of the judicial proceedings shall be made in stages: the pre-trial, trial and appeal. The percentage allotted to the cost of the judicial proceedings for each stage is determined based on current indicators which show that the pre-trial stage varies between 20 and 30 per cent (of the proceedings), the trial stage between 40 and 60 per cent and the appeal stage between 20 and 30 per

cent. A cost ceiling for each trial stage is set based on the percentages so as to monitor payments with a view to ensuring that the ceiling for each stage is not exceeded. Where the actual cost of any of the trial stages exceeds its established cost ceiling level, due consideration shall be given to adjustment provided that the aggregate cost for all stages of the judicial proceedings does not exceed the estimated cost. If, however, the actual cost of the judicial proceedings at any of the stages is lower, the difference should be reported as savings in favour of the Tribunal. In the event that the actual total cost exceeds the estimated cost owing to circumstances beyond the control of the parties, the excess cost should be borne by the Tribunal. Should the actual cost of the judicial proceedings be lower, adjustment should be made only on the Tribunal's share of the cost of the proceedings. No adjustment should be made with respect to the net worth of the partially indigent accused. When settling defence teams' claims for fees and travel expenses, which are to be submitted on a monthly basis, the Tribunal should only bear its portion of the costs. The costs should be prorated by applying the ratio of the share of the Tribunal to the total cost of the trial. The aggregate of such payments should not exceed the total share of the Tribunal as per the established formula. Payment of the balance should be borne by the accused. Where for example it has been decided that the accused has to meet 20 per cent of the cost of the proceedings, the Tribunal would bear 80 per cent and the balance of 20 per cent would be collected from the accused by counsel.

36. It should be noted that the trial of a case before the Tribunal is divided into three stages for the purpose of legal aid. There is the pre-trial stage, where the indigent accused is assigned a defence team to start the preparation and familiarization of the defence case. There is the trial stage when the accused case is being heard, and there is the appeal stage. In the system prior to these reforms, the Registry put the maximum monthly hours for which defence teams could claim for legal fees for each stage of the proceedings at 175 hours per month without discrimination. As a result of the consultant's recommendation (f) a proposal is being put before the President for his consideration to reduce the maximum monthly hours from 175 to 100 for lead counsel and co-counsel during the pre-trial stage. While reasoned requests for a pre-authorized exception to the rule could still be considered, the Registry is of the view that the lower amount is still substantial and reasonable, as a norm, considering that the pre-trial stage is not the most active of a case's stages. The maximum monthly hours for the trial stage and the appeal stage will remain as before.

37. In concurrence with recommendation (k) the Registrar will table the matter for the consideration of the Management Committee of the Tribunal to see whether judges are willing to take on the responsibility of making a recovery of defence costs order at the end of each case. This recommendation has legal implications and will of necessity require the amendment of the rules of procedure and evidence and the directive on the assignment of defence counsel.

V. Areas for future reforms

38. In addition to the reforms already in place, the consultant has recommended an alternative method of reforming the legal aid system. He has recommended the appointment of a team of up to four people who are independent of the Rwanda and Yugoslavia Tribunals and based away from Tribunal headquarters to avoid the risk

of allegations of breach of confidentiality and who will be responsible for the assessment of the defence team's costs claim (recommendation (a)). Although the recommendation has exceeded the confinement of the consultancy to the Rwanda Tribunal insofar as it purports to extend its operations to the legal aid programme of the Yugoslavia Tribunal (the terms of reference of the consultancy did not extend to the operation of the Yugoslavia Tribunal), the recommendation is received with the utmost interest and the Registrar is looking at its feasibility and how best and how soon it may be implemented for the Rwanda Tribunal.

39. In this regard, the consultant has been contacted to elaborate further the recommendation and specify the relationship between the independent team and the Rwanda Tribunal as well as the relationship between the independent team and counsel as regards approval of work schedules and assessment of defence claims. Contacts have already been made with the Law Society of South Africa and other consultants are being contacted in order to advise, inter alia, on possible mechanisms for the functioning of the independent team, the expertise of the members of the independent team and a projection of the costs involved. The outcome of these various contacts and actions will be used for a detailed drafting of a system based on the assessment of defence claims by an independent team. The draft system will then be submitted to the Bureau of the Tribunal for consideration.

40. The consultant recommended the establishment of a contract system (recommendation (p)) and a payment on account system (recommendation (q)). It should be noted that this proposal is different in nature from that of appointment of an independent team. The Tribunal may not be able to adopt all of the alternatives recommended by the consultant, but should select those that best meet the overall requirements.

41. As regards recommendation (q) dealing with a payment on account system, it is the Tribunal's opinion that this will be one of the methods of payment that the independent team will consider once it is established.

42. The current practice at the Tribunal is to assign counsel from a short list submitted by the accused person and drawn from the list of eligible counsel kept by the Registrar in accordance with article 45 of the rules of procedure and evidence. The Tribunal is of the opinion that given, inter alia, the international character of the Tribunal and the principle of equality of treatment of persons fulfilling the same mandate, the implementation of recommendations (n) and (o), which might be seen as discriminatory in nature, will raise strong objections. It should be recalled that when the Registrar imposed a temporary moratorium in 1998 against lawyers from some countries in order to achieve a geographical balance there was strong opposition and criticism from several quarters. It should be observed in passing that at the moment there are 54 detainees, of which 52 have already been assigned counsel.

43. The consultant also suggested that accused persons be allowed direct access to supporting defence team members (recommendation (m)). Under the current system legal assistants are allowed to interview the accused directly only under exceptional circumstances. However, the rules and jurisprudence of the Tribunal on this issue do not allow defence investigators to deal with issues that are essentially client/lawyer matters. Indeed, it is the belief of the Tribunal that the mandate of representing the accused persons falls on the lead counsel who has the necessary qualification, experience and expertise to advise the accused persons as to the conduct of his

defence. Defence investigators are not trained as lawyers and they cannot be substituted to do the work of the lead counsel. Furthermore, although the recommendation is aimed at reducing the cost, it has to be noted that based on experience direct access to accused persons by defence investigators/legal assistants has led to serious problems in terms of management of the flow of the daily visitors at the detention centre as well as in terms of efficiency of the time spent and charged to the Tribunal by supporting defence team members. In addition, such direct access could lead to duplication of work, bearing in mind that the supporting defence team member who does not have the qualification and expertise to advise the accused persons will report to the lead counsel the conversation held with the accused and hand over to him or her documents communicated by the accused. The lead counsel would then go through the documents again.

44. The consultant also suggested that the Office of the Prosecutor addresses problems of the late disclosure of evidence (recommendation (e)). This problem has already been brought to the attention of the Prosecutor. It should also be noted that this issue was dealt with in a document of ADAD to the Advisory Committee on Administrative and Budgetary Questions on 5 July 2003. The document was passed on to the Prosecutor for her attention. It is hoped that with the completion strategy the Prosecutor will address these problems.

45. Lastly, the consultant proposed that the investigator who arrests a suspect supply information of the suspect's circumstances to the financial investigator at the time of arrest (recommendation (j)). In the past, contacts were made to the Office of the Prosecutor in this regard and the Financial Investigator, once on board in mid-September 2003, will ensure that there is continuous consultation between his office and the investigators who arrest the suspects.

46. As part of the reforms, work is in progress within the Electronic Data Processing Section of the Tribunal in close collaboration with the Defence Counsel Management Section in computerizing some of the functions of the Section as initially envisaged in the terms of reference of the consultancy. A programme has already been designed and is running on a trial basis and further development will continue thereafter to better monitor the defence's expenditures.

VI. Conclusion

47. **As the experience in national jurisdictions and in the Yugoslavia Tribunal amply demonstrates, the reform and refinement of a legal aid system is inevitably something of an ongoing process. In this regard, the Rwanda Tribunal will continue to refine and review the mechanisms put in place in order to control legal aid expenses.**

48. **However, it is respectfully submitted that the substantial number of modifications and improvements detailed above, which have been instituted after anxious and prolonged consideration given to the subject matter by the Registrar and his senior staff, both legal and financial, will lead to a better management, monitoring and control of the legal aid system as requested by the General Assembly in paragraphs 14 and 15 of its resolution 57/289.**

Annex I

Consultancy report on the legal aid programme for defence team members at the International Criminal Tribunal for Rwanda[a]

I. Introduction

1. On 20 December 2002, the General Assembly adopted resolution 57/289, in which it requested the Secretary-General:

(a) To prepare a comprehensive report on the progress made by the International Tribunal for Rwanda in reforming its legal aid system for consideration by the General Assembly in the main part of its fifty-eighth session;

(b) To submit to the General Assembly at its fifty-eighth session the proposed budget for the Tribunal for the biennium 2004-2005, which should include revised arrangements for preventing overexpenditures by defence counsel and for managing, monitoring and controlling the expenses of the legal aid system of the Tribunal, which should be included in support of proposals for defence costs, including a full definition and establishment of quantitative criteria for determining indigence and partial indigence based on, inter alia, the defendants' circumstances and ability to pay.

2. In the same resolution, the General Assembly resolved to increase the budget of $197,127,300 gross for the biennium 2002-2003 by $4,657,600 gross.

3. During the debate on the item, some speakers, while commending the performances of the Tribunal, expressed concern about the funding of legal aid costs for suspects/accused appearing before the Tribunal.

4. As a result of an approach to the United Nations Department of the United Kingdom Foreign and Commonwealth Office in London from the Tribunal the Lord Chancellor's Department in London requested that I act as a consultant to the Tribunal in relation to various matters concerning legal aid granted to suspects appearing before the Tribunal.

5. The specific objectives were (a) to assist in establishing a clear working definition of indigence; and (b) to review and design a new system of payment for defence teams under the legal aid programme of the Tribunal.

6. I visited the headquarters of the Tribunal at Arusha, Tanzania, from 5 to 24 May 2003.

7. On 26 and 27 May, I visited the International Criminal Tribunal for the Former Yugoslavia at The Hague. From 28 to 30 May I had consultations with Nigel Field of the Legal Services Commission in London.

8. During my visits to the Rwanda and Yugoslavia Tribunals I was able to speak to the recently appointed President of the Rwanda Tribunal Judge Erik Mose, the Registrar Adama Dieng and the Deputy Registrar of the Rwanda Tribunal Lovemore Green Munlo and the Registrar of the Yugoslavia Tribunal Hans Holthuis. I had

[a] Report prepared by Master G. N. Pollard, Costs Judge, Supreme Court Costs Office, Cliffords Inn, Fetter Lane, London EC4A 1DQ.

intensive consultations with Rhys Burriss, the Chief of the Defence Counsel Management Section at the Rwanda Tribunal and his Deputy Chief, Didier Daniel Preira.

9. I am extremely grateful for the assistance I received from all those that I had contact with in Arusha and in particular to the staff members of the Defence Counsel Management Section.

10. I am also extremely grateful for the assistance I received during my visit to the Yugoslavia Tribunal and in particular to Monique Martinez, the Deputy Co-Coordinator of the Office for Legal Aid and Detention matters.

11. At the Legal Services Commission I received unstinting help from Nigel Fields, the Head of the Criminal High Cost Cases Unit of the Legal Services Commission.

II. Background

12. On 8 November 1994, the Security Council of the United Nations, acting under Chapter VII of the Charter of the United Nations, decided, having received a request from the Government of Rwanda, to establish an International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 (resolution 955 (1994)).

13. At the time of my visit to the Tribunal, six suspects were serving their sentences in Mali, one suspect had been released and one had died. There were 49 accused on trial or awaiting trial. There were five accused with pending appeals.

14. The total number of arrests for the Tribunal was 65.

15. Of the suspects on trial or awaiting trial, 2 made their initial appearance in 1996, 10 in 1997, 2 in 1998 and 11 in 1999. The remaining accused made an initial appearance in 2000, 2001 and 2002.

16. In the vast majority of cases a defence counsel is appointed shortly after the suspect is transferred to the Tribunal. He or she continues to act until any appeal is concluded.

III. Executive summary

17. The assignment of defence counsel is governed by the Directive on the Assignment of Defence Counsel (the Directive). The document was prepared by the Registrar and approved by the Tribunal on 9 January 1996 and amended on 6 June 1997, 8 June 1998 and 1 July 1999.

18. The Registrar of the Tribunal Adama Dieng, is responsible for the assignment of defence counsel. He is assisted by the Deputy Registrar, Lovemore Green Munlo.

19. The day-to-day administration of the legal aid system of the Tribunal is carried out by the Defence Counsel Management Section. The Section comprises the senior legal officer, Rhys Burriss, and the Deputy Chief Legal Officer, Didier Daniel

Preira. The Section is a comparatively small one which, in addition to the legal officers, comprises a legal assistant, a bilingual secretary, an administrative assistant and a secretary. At the time of my visit there were two temporary staff, a financial assistant and a documents clerk.

20. In addition to its responsibilities in relation to the defendants' legal aid, the Section is responsible for other matters, including the administration of the detention centre.

21. While the present report may be critical of the defence legal aid system, it was clear to me during my stay in Arusha that the Section was working under considerable pressure because of all the responsibilities placed upon it and its small staff.

IV. Recommendations

22. A team should be appointed of up to four people who are independent of both the Rwanda and the Yugoslavia Tribunals, to be responsible for the assessment of the defence team's costs claim.

23. The team should audit the defence team's costs and have access to the defence team's papers.

24. Claims by all members of a defence team should be assessed by one person at the same time.

25. Where more than one suspect is tried at the same time, the costs of all defence teams should be assessed by one person at the same time.

26. Motion hearings at the Tribunal should be dealt with in writing or by video link.

27. The Office of the Prosecutors should address problems of late disclosure of evidence.

28. The Tribunal should reduce or abolish the monthly allowance of 175 hours.

29. More detailed information should be given by lead counsel when requesting authorization of co-counsel, legal assistants and investigators.

30. Consideration should be given to making lead counsel responsible for all costs incurred by the defence teams.

31. Consideration should be given to the appointment of a financial investigator at the Rwanda Tribunal.

32. The investigator who arrests a suspect should supply information to the financial investigator on the suspect's circumstances at the time of arrest.

33. Consideration should be given for Chambers hearing a case to make a recovery of defence costs order at the end of the case.

34. Persons with assets below $10,000 should be deemed indigent.

35. Consideration should be given to allowing lower grade fee earners to interview suspects.

36. Consideration should be given to restricting the lists of lead counsel, co-counsel, legal assistants and investigators to persons who reside in Africa or that all co-counsel, legal assistants and investigator are from Africa.

37. Consideration should be given to fixing a variable hourly rate based on the place of residence of the defence team.

38. Consideration should be given to establishing a contract system.

39. Consideration should be given to setting up a payment on account system.

40. An appeal procedure for dissatisfied defence team members should be set up.

V. Legal aid system

A. International Criminal Tribunal for Rwanda

41. The Defence Counsel Management Section, subject to the approval of the Registrar and the Deputy Registrar, has to carry out various tasks in relation to defence counsel teams. The lead defence counsel, co-defence counsel, legal assistants and investigators are entitled to claim their allowances on a monthly basis. These claims have to be considered in detail. All members of the defence team are entitled to claim travel expenses as they are incurred. Where lead counsel requires further assistance, such as the assignment of a co-counsel, legal assistant or investigators the Section has to consider authorizing the expansion of the defence teams and the terms upon which it will allow the lead counsel to expand the team.

42. Where a suspect has been refused a request for assignment of counsel he or she may apply to the President of the Tribunal to review the decision of the Registrar. The President may either confirm the Registrar's decision or allow the review and assign counsel.

43. A suspect is entitled to only one counsel to be assigned to him or her. A counsel cannot be assigned to more than one suspect.

44. The assigned counsel may request the Registrar to appoint a co-counsel to assist him or her. Thereafter the first counsel is designated lead counsel. The lead counsel has the primary responsibility for the defence.

45. The lead counsel may request the Registrar to allow one legal assistant and two investigators, or alternatively two legal assistants and one investigator. The terms upon which legal assistants and investigators are allowed and the period of time that they are allowed is decided by the Registrar. Applications for co-counsel, legal assistants and investigators are initially dealt with by the Defence Counsel Management Section. A directive sets out the qualifications and requirements needed by lead counsel, the position concerning the withdrawal of assignments, applications for replacement of the counsel and provisions in relation to remuneration.

46. The directive also deals with the suspect's right to counsel, the considerations as to whether he or she is indigent and the forms of application that have to be made by the suspect. It also deals with the withdrawal of legal aid where a suspect is no longer indigent.

47. I was told, while in Arusha, that legal aid had never been withdrawn on the ground that the suspect was no longer indigent.

Defence team

48. The defence team consists of a lead counsel and in most cases, on application of the lead counsel, a co-counsel is allowed, as are one legal assistant and two investigators, or alternatively two legal assistants and one investigator.

49. The lead counsel is responsible for all members of his team.

50. Where the lead counsel wants a co-counsel, legal assistant or investigators, reasons have to be given as to why it is necessary for these persons to become involved. I have formed the view that the Defence Counsel Management Section is required to make decisions on whether to allow expansion of defence teams on insufficient information. To a large extent this is because the lead counsel are not prepared to give greater details as to why they want further assistance for fear of breaching the confidentiality of the suspect.

51. Detailed disclosure of information may be a real concern to the lead counsel when applying for further assistance and for their teams to be expanded but this is not satisfactory for the efficient administration of the legal aid system.

52. I was told that one of the main reasons why the lead counsel are concerned about the confidentiality principle is that the Office of the Prosecutor is located in the same building as the Tribunal. I was given no evidence of there being any breaches of confidentiality, nor in particular any breaches of confidentiality to the Prosecutor or her team.

Status of proceedings

53. The Tribunal's legal system has various stages of proceedings. They are pre-trial preparation; in-trial; sentencing proceedings; appeal proceedings; and review proceedings.

54. Because of the length of time suspects spend in detention the pre-trial proceedings are often extremely long. This increases the costs of all members of the defence team.

55. The trial proceedings are also extremely long. This is because there is a break between the close of the prosecution case and the opening of the defence case, the closing of the defence case and final speeches by prosecution and defence and between the date of the conclusion of the speeches and the delivery of the final judgement.

56. The breaks in the trial proceedings are often very substantial and during this period all members of the team, not permanently based at the Tribunal, return to their homes. During these long breaks all members of the team are entitled to continue claiming for preparatory work that is being done. The amount of these claims from the papers that I inspected appears to be substantial. Further additional travel costs are also claimed at every break in the proceedings.

57. During the pre-trial stage there are numerous motion hearings. In both cases that I studied in detail the total number of motion hearings were in excess of 20.

58. At the majority of these hearings lead counsel has to appear before the Chambers in Arusha. This involves, in addition to the preparation time that is claimed, substantial travelling expenses and a daily subsistence allowance. Sometimes the motions hearings are called at short notice. The hearing time is normally short.

59. A significant reason for the increase in the pre-trial procedures costs is because of late disclosure of evidence by the Office of the Prosecutor. From the examples that I saw there is obviously a real problem with late disclosure of evidence by the prosecution. Members of the Tribunal from the President downwards are aware of the situation. The problems of late disclosure of evidence has improved since the time that the Tribunal was first set up but it is still a problem. Late disclosure causes substantial increases in the defence teams preparation costs.

Remuneration

60. When the two Tribunals were established in 1994 and 1993, the legal aid system for payment of lead counsel, co-counsel, legal assistant and investigator was formulated. Initially both Tribunals had a similar system.

61. The legal aid system at the Rwanda Tribunal has remained fundamentally the same since its inception. There have however been strenuous attempts to try and tighten up the system. These attempts have not been successful.

62. At the Tribunal, the payment system at present is that on claiming their remuneration counsel have to submit to the Defence Counsel Management Section a statement of fees in accordance with the Directive. This statement must indicate the name of the suspect, the registration number, the stage of the procedure, the date, the time spent and the nature of the activity performed. It should give information enough to show that the time claimed was for work done which was necessary and reasonable for the preparation of the case.

63. Pursuant to article 24(A) of the Directive, the Registrar is entitled to call for any documentation. This would cover the defence teams papers. In practice I am told that counsel's papers and the papers of other members of the defence team are never called for. This inevitably leads to payment being made in respect of work, the reasonableness of which has not been checked.

Lead counsel

64. Article 22(A)(i) provides that a fixed rate be paid for each stage of the proceedings referred to in paragraph 53 above to cover the time spent by counsel in familiarizing themselves with the documentation of the case and the law. The fixed rate is $2,000. The fixed rate covers the reading of the indictment, the Tribunal's rules and regulations and the law applicable to International Tribunals. Apart from the indictment, the lead counsel should not need to carry out this basic reading in more than one case and should only be paid $2,000 in one case. I do not consider that the fixed rates should be paid at each stage of the proceedings.

65. Additional study and research that is not linked to the direct preparation of the case is not included.

66. In addition, the Tribunal pays the lead counsel a maximum of 50 hours for time spent on reading the history and politics of Rwanda at the relevant period. This should not require repetition.

67. Counsel is also paid an hourly rate. The hourly rate is based on the counsel's years of experience. For a counsel of 10 to 14 years' experience the rate is $90 per hour, for those with 15 to 19 years' experience it is $100 per hour; for those with 20 or more years' experience it is $110 per hour. The maximum billable hours that can be claimed by a counsel is 175 hours per month. This maximum of 175 hours applies to all stages of the proceedings. This amounts to a maximum of 2,100 hours per year.

68. The fixed hourly rate covers the direct preparation of the case and all court appearances. Preparation for meetings, note taking and compilation of notes is not reimbursed as a separate activity.

69. Work that is duplicated is not paid but a counsel and a co-counsel can be reimbursed for supervising or coordinating various activities.

70. Meetings between team members are reimbursed when they are spent on coordinating the work.

71. Working sessions between team members are also paid for provided that they are deemed to be reasonable and necessary.

72. Meetings between a counsel or persons representing co-defendants are also reimbursed where it is considered to be reasonable and necessary.

73. In addition all members of the defence team are paid travelling expenses. Written authorization has to be obtained from the Defence Counsel Management Section for any travel and it is to be made setting out the details as to why the travel is necessary.

74. The travel costs are paid on the basis of one economy class air ticket and counsel have to submit with their claim, their original ticket and the original invoice, together with any receipts for payments that were made by credit cards.

75. Counsel is also entitled when away from his home base to a daily subsistence allowance. In Arusha at the present time this amounts to approximately $100 per day. The United Nations fixes the amount of daily subsistence allowance for every country in the world and the amount varies from country to country. I am told that the daily subsistence allowance for The Hague is approximately $400 per day. The daily subsistence allowance is reduced after a period of time.

76. When at the Rwanda Tribunal the defence team is provided with office accommodation and other office facilities. They therefore have very low expenses.

Co-counsel

77. When a co-counsel is appointed he or she is entitled to the maximum of 50 hours reading the history of Rwanda, and a maximum of 200 hours reading the case file of the accused. He or she is allowed an hourly rate of $80 regardless of years of experience, with a maximum of 175 billable hours per month.

78. Counsel is allowed travel expenses and daily subsistence allowance at a similar rate to that of lead counsel.

Legal assistants/investigators

79. The legal assistants/investigators when authorized are entitled to a flat hourly rate of $25 per hour with a maximum of 100 billable hours per calendar month. In addition to this they are entitled to travel expenses and to a daily subsistence allowance that is the same as that of the lead counsel.

80. In addition, legal assistants and investigators are entitled to the cost of travel for hearings, for investigation purposes, measures taken for the production of evidence, expenses for ascertaining the facts, consultancy and expert opinions, translation of documents to be filed before the Tribunal, transportation and accommodation of witnesses, registration, visa fees and similar taxes.

81. All these fees have to be authorized by the Defence Counsel Management Section. Claims for fees by legal assistants and investigators have to be certified by the lead counsel.

82. In addition to an allowance for travel to motion hearings and other travel expenses and daily subsistence allowance the Tribunal allows lead or co-counsel to be reimbursed for the cost of travel to Arusha on a maximum of three occasions prior to commencement of the trial.

83. The article 17 provides that the cost and expenses of legal representation of the suspect must be necessary and reasonably incurred in order for them to be payable by the Tribunal.

84. As I have indicated above, defence teams are reluctant to send their papers to the Defence Counsel Management Section when making a claim. This reluctance appears to be based on the perceived risk of a breach of confidentiality. I consider that a system of production of papers so that a proper audit exercise can be carried out is essential. On the inspection of defence claims that I made while at the Tribunal I found that on the information given to the Defence Counsel Management Service by defence teams it was impossible to decide whether the work was necessary or reasonably done.

B. International Criminal Tribunal for the Former Yugoslavia

85. On 1 January 2001, the Registrar of the Yugoslavia Tribunal introduced a new payment system for defence counsel.

86. While I was at the Tribunal, I was shown a report by Christian Rohde, Acting Legal Counsel with the Registry of the Tribunal, dealing with the background to the introduction of the new system of the Tribunal. This said that reason for introducing the new system was because:

> "The majority of counsel invoiced 175 working hours from the day of initial appearance to the closing of an appeal, a practice which seemed inappropriate."

I agree with this.

87. The report also refers to the attempt made by the Registry at the Tribunal from early 1998 to the middle of January 2001 to audit the invoices of counsel and defence team members. Only 10 per cent of all invoice items were rejected for lack of clarity and presentation.

88. The new system involves estimating the pre-trial preparation work and work for the trial and for the appeal.

89. The least difficult cases are graded as class 1, class 2 are very difficult cases and class 3 are leadership cases. There is also an estimated time for class 1 of four months, for class 2 of six months and class 3 of eight months. For class 1 cases, the lead counsel is allowed preparation of 1,400 hours plus all hearing hours at which counsel attends. For class 2 cases, they were allowed 2,100 hours plus all hearing hours for one counsel. For class 3 cases, the counsel were allowed 2,800 hours plus all hearing hours for one counsel. For the trial all hearing hours are allowed for all classes of cases with an average monthly preparation time over the duration of the trial is fixed for lead and co-counsel at 115 hours. Pre-trial legal assistants or investigators are allowed a total of 2,000 hours for class 1, 3,000 hours for class 2, and 4,000 hours for class 3. During the trial the maximum average monthly working hours allowed for legal assistants and investigators is 150 hours.

90. Different levels are allowed for estimated preparation time for the appeals.

91. When I enquired how many counsel who were being paid under the amended system had claimed less than the maximum allowance, I was told that there was only one. I was also told that applications were being made both to the Registry and to the Chambers for an increase in the estimated hours. Grounds for applying for the increase varied but included extra work being required because of late disclosure.

92. Proceedings before the Tribunal once the trial has started go ahead with only very short breaks. This results in a substantial saving in costs. If there are long breaks in the proceedings it is necessary, particularly for lead counsel, to have to do considerable preparation in order to remember all the details of evidence, etc., that has been given and the legal arguments that are being put forward.

93. The majority of motion hearings at the Yugoslavia Tribunal are dealt with in writing so as to make it unnecessary for counsel or other members of the defence team to attend. I recommend that consideration be given to a similar procedure being adopted by the Rwanda Tribunal and also that consideration be given to whether the motion hearings could be conducted by means of video links.

VI. Indigence

94. Article 2 of the Directive provides that:

> "(a) Without prejudice to the right of the accused to conduct his own defence, a suspect who is questioned by the Prosecutor during an investigation and any accused upon whom personal service of the indictment has been effective shall have the right to be assisted by counsel provided that he had not expressly waived his right to counsel."

95. Article 3 provides:

> "If he has insufficient means, the suspect during the investigation or the accused being prosecuted before the Tribunal may be assigned counsel free of charge ..."

96. Article 4 provides:

> "A person shall be considered to be indigent if he does not have sufficient means to engage counsel of his choice and to have himself legally represented or assisted by counsel of his choice."

97. I would define persons as being indigent when their disposable assets are less than $10,000 and their disposable income is less the minimum wage for the United Republic of Tanzania.

98. I would define persons with disposable assets of over $10,000 as partially indigent and their disposable income of more than the minimum wage for the United Republic of Tanzania as portionally indigent. They should be required to make a contribution to their legal aid costs.

99. The amount of the contribution should be fixed by the Registrar.

100. The procedure adopted by the Rwanda Tribunal is that when a person is arrested he is given a list of counsel by the Defence Counsel Management Section. From this list he has to select three counsel whom he wishes to represent him. He also has to complete a declaration of his means, which includes details of his income and assets owned by him, his wife or persons with whom he habitually resides.

101. At the present time the declaration contains a certificate that the declaration is correct and true to the best of his knowledge and belief.

102. While I was in Arusha the Defence Counsel Management Section proposed an amendment to the form which would provide as follows:

> "I understand and accept that in the event the Tribunal undertakes to pay the costs of my defence, that the Tribunal may require a financial contribution from myself whether now or at any time in the future should it come to the attention of the Tribunal that I possess, or have acquired, the means to make such contribution. My signature below attests to the fact that the Tribunal shall have all necessary legal authority, without further recourse to me, to appropriate any property, real or personal, legally or beneficially owned by me, whether now or in future, and to apply such property or proceeds thereof to defray the costs of the United Nations of providing for my defence under the Tribunal's legal aid programme."

103. I am told that at the present time any person who has assets exceeding $740,214 dollars is alleged to be not indigent and is not eligible for legal aid. This figure is based on the average cost of a trial before the Tribunal.

104. Suspects or accused with assets below that threshold but having more than $10,000 are considered to be partially indigent and those with assets below $10,000 are deemed to be indigent.

105. From the information that I obtained when in Arusha it was apparent that it was extremely difficult to ascertain and monitor the assets of the accused.

106. It should be borne in mind that suspects have been arrested in many countries throughout the world.

107. In many cases the suspects have been away from Rwanda for a long period of time.

108. At the present time the Defence Counsel Management Section makes attempts to find out details of the financial circumstances of the suspect by making enquiries of the countries in which they were arrested.

109. This has not been satisfactory. I was told of a case where a suspect was arrested in the United States of America and appeared to be living in very comfortable circumstances. The Defence Counsel Management Section requested the United Nations to make enquiries as to the means of this defendant. Although this request had been made, and followed up, no satisfactory replies have been received.

110. Consideration has also been given to the appointment of a financial investigator.

111. The Yugoslavia Tribunal has a financial investigator to whom I spoke briefly when in The Hague. He indicated that he was having some success in the enquiries that he was making. I consider that the Rwanda Tribunal would be well advised to consider the appointment of a financial investigator who would be able to coordinate all enquiries in relation to the suspects.

112. There are considerable difficulties in relation to financial contributions being made by suspects. Suspects are held in detention for a considerable period of time and thus during that period of time have no earned income.

113. It should also be borne in mind that if the suspects' assets are outside Rwanda, there is likely to be considerable difficulty in enforcing recovery of any assets. For example: spouses or other members of the suspect's family could claim that assets belong to them. This would mean legal proceedings would have to be taken in the relevant country to establish that the assets belonged to the suspect. The cost of these proceedings could be considerable.

114. When the accused is initially detained on the instructions of the prosecutor, presumably the investigator who traces the suspect is able to form some idea as to the suspect's means. I would recommend that this investigator communicate this information to the Defence Counsel Management Section and to any financial investigator appointed.

115. Because of the difficulties of requiring contributions to be made by suspects consideration should be given to allowing the Chambers hearing the suspect's case to submit a recovery of defence costs order at the conclusion of the trial. It should have been possible by then to obtain more information about the background and financial position of the suspect.

116. I was told when I was at the Yugoslavia Tribunal that in one case where the suspect was ordered to make a contribution he promptly indicated that he no longer required legal aid and that he would represent himself. This was adding complications to the trial procedure.

117. I draw attention to the fact that in England, where in the past contribution orders were made, they have now, in criminal cases, effectively been abolished and the Legal Services Commission relies on the courts making a recovery of defence costs order at the end of the case. At that stage there is an investigation and once the investigation is concluded the matter is reported back to the Commission. I would suggest that this procedure might well be one that could be followed by the Rwanda Tribunal.

118. I consider that the forms that have to be completed by the suspect should be amended to provide further information of the suspect's means.

VII. Examination of the system at the International Criminal Tribunal for Rwanda

119. In the short time that I was in Arusha I conducted a detailed examination of a very limited number of papers. I consider that the legal aid systems of both the Rwanda and Yugoslavia Tribunals are flawed and are open to abuse.

120. I inspected the claims of lead counsel, co-counsel, legal assistant and investigators for limited periods. At the present time each claimant submits his or her monthly claim separately. No attempt is made to compare the claims on a monthly basis of the various members of the defence team with others. In at least two cases that I examined in detail I was unable to reconcile the claims of four members of the defence team. If all claims were submitted and considered at the same time, questions could be raised of the members of the defence team as to why their claims for time spent did not agree with those of other members of the team. I consider that some audit exercise is essential. I was told by the Chief of the Defence Counsel Management Section that as from the present time an attempt would be made to see that all claims from members of the defence team were considered at the same time and comparisons made.

121. I consider that without the production of their papers it is impossible for the Defence Counsel Management Section to decide whether the time claimed is reasonable. Descriptions of work done given by counsel in relation to the work done are extremely brief, referring to "preparing witness statements", "witness summaries" and "witness questions", etc. Without having an opportunity to inspect the documents it is impossible to form a view as to the reasonableness of the claim. Further information applied for in response to requests from the Section was brief in the extreme and in some cases curt and rude.

122. In one case descriptions of work done referred to "preparing for meeting with client" and "working on instructions". Although the times claimed were very considerable no further details were given. I consider that this is unsatisfactory in that nobody knows whether the papers that were being considered were considerable or of a small amount.

123. I was also concerned about the number of hours that were claimed. In the majority of cases that I considered lead counsel, co-counsel, legal assistants and investigators were all claiming the maximum hours that they were allowed. In only one case did I find that lead counsel had claimed different hours per month. In that case lead counsel claimed when initially instructed a large number of hours. Subsequently he claimed little or nothing for some months and shortly before a motions hearing and the trial he would then claim a considerable amount and was only allowed the maximum of 175 hours. It was clear to me that this counsel was being prejudiced by the inflexible system that is operated. During the period of the trial he was working over 200 hours per month but his hours were reduced to 175. Having looked at the total figures I discovered that the hours claimed by that counsel and the hours claimed by his co-counsel differed considerably. The hours of the lead counsel who claimed on what I consider was a reasonable basis were far

less in total than those of his co-counsel and the financial payments to the two lead counsels differed by over $100,000.

124. I find it difficult to accept that all counsel will be working on the Rwanda Tribunal cases 175 hours per month both for pre-preparation, preparation during breaks in the trial and preparation for the appeal.

125. I find it difficult to accept that all counsel bar one appearing in cases at the Yugoslavia Tribunal need the maximum estimated preparation time.

126. I consider that the hours presently allowed at the Rwanda Tribunal to be excessive certainly for the whole of the pre-trial breaks in the trial and pre-appeal preparation time. They amount to a total of 2,100 hours per year. It has to be borne in mind that counsel have to take holidays and have to have some breaks at weekends. During the breaks in trial, which are long, counsel are likely to undertake other work in their home country. I consider that it is fundamental that counsel should give greater particulars as to the work that they have undertaken. Counsel should be called upon to submit papers in support of their claims. Comparisons should be made not only with other members of their team, as indicated above, but also with other lead counsel and co-counsel who are appearing for co-defendants in the same case.

127. From my brief inspection of counsel claims while at the Rwanda Tribunal I discovered that some counsel were claiming over 2,100 hours working in a year. Since my return to the United Kingdom I have made enquiries of the number of hours expected to be recorded by partners undertaking solely fee earning work. The highest figures that I have been given is between 1,600-1,700 per year. The Law Society in London has estimated that the amount of chargeable time for an average solicitor is between 1,000 and 1,200 hours per year. I therefore consider that the total monthly hours of 175 allowed by the Tribunal is far too high.

128. I found it quite impossible to judge the necessity or reasonableness of hours claimed by legal assistants.

129. Claim for hours spent were high but the explanation for these long hours was not forthcoming in that it would refer merely to "preparing the witness" and "reviewing witness evidence". It was impossible from these brief descriptions to form an opinion as to whether this work was either necessary or reasonable.

130. Investigators' claims presented similar problems in that they referred to "tracing potential witnesses" without any further details. It was impossiole on the information that was provided to form any opinion as to whether the work was necessary and reasonable.

VIII. The United Kingdom experience

131. While I was considering these matters during my stay at the Rwanda Tribunal I was reminded of the case in the United Kingdom, *Francis v. Francis & Dickerson*, reported in *All England Law Reports 1955*, volume 3 [1955] 3 AER 836. This case was decided by Mr. Justice Sachs shortly after the comprehensive legal aid system had been introduced to the United Kingdom. In that case Mr. Justice Sachs said:

> "Indeed one of the fundamental principles on which the legal aid system is based is that the assisted person, his solicitor and his counsel have the same

freedom in the conduct of the assisted case, and are entitled to the benefit of the same relationships, as in a similar matter where the lay client is not an assisted person. Solicitor and counsel have thus to approach the consideration of any problem as to incurring reasonable expenses to obtain justice in an assisted case in the same way as if the lay client were a person whose means enabled him to fight that particular case in a reasonable manner ... [page 839H]"

"...

"When considering whether or not an item in a bill is 'proper' the correct viewpoint to be adopted by the taxing officer is that of a sensible solicitor sitting in his chair and considering what in the light of his then knowledge is reasonable in the interests of the lay client ... I should add that, as previously indicated, the lay client in question should be deemed to be a man of means adequate to bear the expense of litigation out of his own pocket — and by 'adequate' I mean neither 'barely adequate' nor 'super abundant'. It may save misapprehension, too, if one remembers that neither in an unassisted nor in an assisted case has a solicitor any implied authority to take steps which are extravagant or over cautious. A vital distinction, however, between an unassisted case and an assisted case is that in the latter there is no-one who can give an express authority to the solicitor to enable him to charge for steps. That leads, of course, to an essential difference between taxations of the type now under consideration and a solicitor and own client taxation. [page 384D]"

132. In the case of *Storer v. Wright & Anor* reported in *All England Law Reports*, [1981] AER 1015 the assessment/taxation of legal aid costs was dealt with by Lord Denning. Dealing with the assessment of costs where the client was legally aided, as opposed to being unassisted, Lord Denning said:

"A legal aid taxation is different from all others, in that there is no-one to oppose it. It is not adversarial but is inquisitorial. The Taxing Master is the inquisitor ...

"There is no one to contest the amount at all. If the client has lost the case and has a nil contribution, he is not concerned in the least at the amount that the solicitor charges ...

"Seeing that there is no one to oppose, it seems to me, that on a legal aid taxation, it is the duty of the taxing officer to bear in mind the public interest. He should disallow any items which is unreasonable in amount or which is unreasonably incurred. In short whenever it is too high, he must tax it down. Otherwise, the legal aid system could be much abused by solicitor and counsel. Not that it was abused in this case. But there is a possibility of it unless closely watched ...

"If costs are passed without enquiry, the Fund will suffer. The public will have to pay more than they should ...

"Lawyers must not think that, on getting a certificate for legal aid, they have a blank cheque to draw on the legal aid fund as if it were a client with a bottomless purse ready to pay for everything the lawyer could think of. The only safeguard against abuse is the vigilance of a Taxing Master. He has a difficult task. With no one to oppose him, he has to take much of the solicitor's

word for granted, as to work done. It would be easy for him to let everything go without question. But he must resist that course."

133. On the information that is supplied to the Defence Counsel Management Section it is impossible for it to be an effective watchdog. A better audit system must be introduced if there is to be an effective assessment of the claims of all members of the defence team.

134. Experience in the United Kingdom has shown that the only effective way of making a reasonable assessment of costs is by examining the suspect's legal team's file of papers, and where possible comparing the times claimed and work done between the members of the team and also comparing with work done by the legal team for suspects appearing at the same trial. In this way it can be ascertained whether there has been duplication by members of the team. It can be ascertained whether the fees claimed by one team are considerably in excess of those claimed by another suspect's team. It can be ascertained whether there is a reasonable explanation for discrepancies in hours. It can be ascertained whether the times claimed for undertaking tasks were reasonable or excessive. Where times claimed are unreasonable or excessive reductions can be made. As indicated below members of the defence team would have to be able to make representation where reductions were made and there would have to be an appeal procedure from the determinations made by the person assessing the claims for costs.

135. From the limited enquiries I have been able to make of the practice in other countries of the world when they have an hours related system, I have discovered that it is not unusual to call for defence counsel's papers. This is the only way that a proper audit exercise can be carried out.

IX. Travel

136. From my inspection while at the Rwanda Tribunal it would appear that all claims for travel are reasonable. It would appear that they are scrutinized with care and queries are raised when any item is not clear or apparently not claimable. Deductions are made for this. The underlying difficulty is whether all the journeys, particularly of investigators, are reasonable. Although authority has been given by the Defence Counsel Management Section, this authority was given on the sparsest of information and greater disclosure of purposes of visits should be given.

137. Consideration could also be given to making the lead counsel personally responsible for all costs claimed by members of his or her team. If, on assessment of the claim, it was decided by the person making the assessment that the journey was not reasonable it would be possible to disallow the item and if the money had already been paid, for example, to the investigator, the lead counsel would be responsible for making repayment to the Tribunal.

X. Daily subsistence allowance

138. The amount of daily subsistence allowance is fixed in accordance with the United Nations scale. The only comment I would make in relation to this is that I consider that there could be some variation in the amount of daily subsistence

allowance allowed for lead counsel and that allowed for investigators. It may be however that this is contrary to the United Nations rules and procedures.

XI. Defence counsel costs — new systems

139. As I have indicated above I consider that the present system of dealing with defence teams' costs to be unsatisfactory. Consideration should be given to new systems.

XII. Grading the defence team

140. At the present time only the lead counsel or co-counsel can interview the suspect at the detention centre. I do not consider that this is cost effective. I recommend that legal assistants who are paid at a lower hourly rate should be entitled, subject to verification of their qualifications, to interview suspects.

141. At the present time I understand that a number of the investigators who form part of the defence team are sometimes members of the suspect's family or close friends of the suspect. This is clearly unsatisfactory and is a practice that ought to be stopped. If this were stopped there is no reason why totally independent investigators, again paid at a lower hourly rate, should not be entitled to be paid for interviewing the suspect.

XIII. Lead counsel's duties

142. Not all tasks need to be done by the lead counsel who is paid at the highest hourly rate. Much of the work could be done by the co-counsel and legal assistants who are paid at a lower hourly rate. This would produce a substantial saving.

143. Consideration should be given to making the lead counsel personally responsible for the costs and expenses of the investigators/legal assistants. This would mean that the lead counsel would require to be satisfied that the investigator/legal assistant was necessary and that his expenses were reasonable.

144. Consideration should also be given to limiting the lists of lead counsel, co-counsel, legal assistants and investigators. At the present time these persons come from all over the world. Africa is a large continent and has sophisticated legal systems. I do not consider that it would be unreasonable to limit the defence team to persons who live and work on the African continent. A substantial saving in travel expenses would result. If this is not acceptable further consideration should be given to the Defence Counsel Management Section allowing only co-counsel, legal assistants and investigators from Africa.

XIV. Hourly rates

145. Consideration should also be given to the fixing of a variable hourly rate. A person who has offices in Africa is likely to have lower overhead and therefore lower hourly rates than a person practising in New York. Just as the daily subsistence allowance paid by the United Nations varies from country to country so an hourly rate could vary from country to country.

146. The present system operated by the Rwanda Tribunal in relation to allowing 175 hours per month should be abolished. I have indicated my reasons for this recommendation above. I also consider that the minimum hours allowed for legal assistants and investigators should be abolished and they should be allowed only what is reasonable for work necessarily and reasonably done.

XV. Audit system

147. The Tribunal, at the present time, has the right to call for the papers of the defence team. This right is not exercised. I consider that it is essential that this be done. If this exercise is to be carried out by the Defence Counsel Management Section the staff levels in the Section would have to be increased.

148. I consider that it would be advisable for the Rwanda and Yugoslavia Tribunals to cooperate on setting up a system whereby there is appointed a team of persons who are responsible for the assessment of the reasonableness and necessity of the defence team's costs. Such a team need only comprise three or four people but would have to be independently based and away from Tribunal headquarters to avoid the risk of allegations of breach of confidentiality. This team would call for the papers of the defence team and would be able to examine them to ascertain whether times claimed were reasonable and whether work done was necessarily done. They would also be able to compare the work done by the whole of the defence team to see whether there was any unnecessary duplication. They would further be able to compare the costs of other defence teams in multi-handed cases and ask for explanation where there was a wide divergence in the amounts that were being claimed and the work that was being undertaken. Ideally this would be done each time a member of the defence team submitted a claim.

149. All defence teams that are operating in the Rwanda Tribunal were appointed under the articles that existed at the time of their appointment. There is no difficulty in calling for defence papers since this is already provided for in the Directive. There may however be considerable resistance to the reduction of the 175 hours at present allowed for lead counsel and the allowances of hours for co-counsel, legal assistants and investigators. To counter this, notice would have to be given indicating the change of procedures.

150. I consider that before assessing any defence teams costs their papers should be lodged with the person making the assessment. This should be the standard practice of the Defence Counsel Management Section.

151. After the person assessing the defence teams costs had completed the assessment all papers together with the claims forms would be returned to the lead counsel. The claim form would show what items of work had been disallowed and why.

152. Any member of the defence team who was dissatisfied with the allowance would be able to submit in writing to the person who made the assessment the reasons for dissatisfaction. The person who made the assessment would consider the representation and either confirm the assessment or increase the assessment in the light of the representation. This decision would be given to the defence team member in writing.

153. I consider that subject to limiting the area from which lawyers and the defence team members are drawn the systems at present operated by the Defence Counsel Management Section in relation to the travel and daily subsistence allowances to be satisfactory. The only reduction that could be made in travel expenses would result from not requiring anybody to attend at motions hearings, case management conferences and limiting the number of attendances at the detention centre to see the suspect and to appear at the Tribunal for the purpose of the trial.

154. Consideration should also be given to reducing the overall length of the trials and to having only the very minimum of breaks until the closing speeches. This would result in a saving of travel expenses and preparation time. It would also mean altering the existing Chamber's system of hearing more than one case at a time.

XVI. Contract system

155. An alternative system would be to enter into a contract with the lead counsel at the outset of the case.

156. The contract would have to be agreed with the lead counsel. It would identify all work that is required to be done, the grade of the fee earner who was going to do the work, the expenditure that was going to be incurred and the responsibilities of each individual in the team. The contract would have to be monitored throughout the pre-trial, trial and appeal stages by a contract manager who would be an employee of the Tribunal. The contract manager would agree to work for, say, a three-month period. Thereafter the lead counsel would submit a report and the contract would be reviewed in the light of circumstances then prevailing. The contract manager could agree to amendments, for example where late disclosure was made and the costs previously agreed had been increased.

157. The contract manager would also agree who was going to undertake certain items of work. He would need to identify whether work that was required would be more suitably carried out by a person of a lower grade than the lead counsel.

158. Under the terms of the contract, as at present, legal research, administrative work and matters of that nature would not be provided for or paid for by the Tribunals.

159. The lead counsel would have to set out a stage plan setting out: the work that had to be undertaken; the timetable for work that was going to be undertaken; the personnel to be used by the defence; the role to be undertaken by the members of the defence team; the use to be made of experts; and their roles in what they were undertaking. The plan would also set out the anticipated cost.

160. Again the contract manager would have to be based away from the headquarters of the Tribunals to avoid any allegations of breaches of confidentiality.

161. Where the lead counsel and the contract manager could not agree on the reasonableness or necessity for the work to be done or on the grade of the fee earner to do the work, there would be an appeal system.

XVII. Payment on account

162. A further feature that could be introduced would be to pay the lead counsel a proportion of the monthly claimed fees by all his team. Each month when counsel submitted his claim he would be entitled to only say 75 per cent of the total amount he claimed by him and his team. At the end of the case the total costs would be assessed and any balance would be paid to the lead counsel. If there was found to have been an over payment this would have to be repaid by the lead counsel.

163. At the end of the case there could be no possible objection to an assessment officer inspecting and carefully examining all papers of all members of the defence team. At that stage the person who was responsible for the assessment of costs would examine the papers carefully and decide whether there had been duplication of work among the defence team, whether there had been unnecessary work, whether times claimed for doing work were unreasonable and all other matters.

164. If it was found that the work was unnecessary or unreasonable and the defence team's costs were reduced below the 75 per cent that had been paid on account the lead counsel would have to refund any difference. If that lead counsel was responsible, personally, for the costs and expenses of the co-counsel, legal assistant and investigators and it was found by the person responsible for the assessment that work done by the legal assistant, co-counsel or investigator was unnecessary the lead counsel would be called upon to refund any difference to the Tribunal.

165. I consider that if a team of three or four persons were set up in a convenient place they would be able adequately to deal with the costs claimed by defence counsel of both the Tribunals.

166. Over a period of time this team would become familiar with work that had to be done. It would become familiar with defence teams and the team would build up trust of the defence teams.

167. Some training would have to be given to the persons who would be responsible for these assessments. I do not consider that it is necessary for persons who would form part of this team to be qualified lawyers although they would probably need to have some legal background.

XVIII. Appeals

168. Whatever system is adopted for dealing with costs there should be an appeal procedure for lead counsel and any member of the defence team who was dissatisfied with the assessment.

169. Ideally I consider that there should be one person, appointed by the President of the Tribunal, to deal with all appeals.

170. Because of the distances involved the appeals should be in writing. The appellant would set in writing the reason for his dissatisfaction. The person who had made the assessment and review would give in writing the reason for his decisions. The person dealing with the appeal would either confirm the assessment, further reduce the amount allowed or increase the amount allowed.

171. In the alternative appeals could be dealt with by the Advisory Panel referred to in article 29 of the Directive. I do not favour this solution as the Advisory Panel as presently constituted consists of seven persons.

172. If the member of the defence team who was appealing wanted an oral hearing it should have to be done by video link paid for by the person who was appealing.

173. One of the matters I was asked to consider was the effectiveness or otherwise of the system at the Yugoslavia Tribunal. I have already indicated above that I do not consider the system implemented by that Tribunal in 2001 to be totally satisfactory. I consider that the legal aid system would be better if it operated in accordance with the suggestions set out above. I suggest that a unified procedure be put in place for all international tribunals.

XIX. Computers

174. Part of my terms of reference were to consider a computer-based system. I am not competent to advise on the setting up of a computerized system. When I was first asked to undertake the consultancy at the Rwanda Tribunal it was said that there would be present a representative of the United Kingdom Legal Services Commission and two Urited States lawyers. None of these were present.

175. If a new computerized system is to be set up I would suggest that the advice be taken from an expert and I would consider Nigel Field of the Legal Services Commission in London a person who should be consulted in relation to setting up any such system.

176. If it is decided to implement any of the suggestions set out above at the Rwanda Tribunal consideration would have to be given to the feasibility otherwise of altering the terms under which existing defence teams operate.

177. I consider that unless all defence teams who are currently instructed at the Rwanda Tribunal are brought under a new system, the cost of implementing any of the suggestions above will not be cost effective.

XX. Fee splitting

178. Concern was expressed that members of the defence team, including the lead counsel, had been involved in fee splitting, i.e., agreeing to give part of their fees that were paid under the legal aid system to the suspects or their families. This is normally regarded as professional misconduct. If there is evidence that this has occurred then the lead counsel and co-counsel should be reported to his country's bar or law association. If such fee splitting was done by legal assistants or investigators they should immediately be required to leave the defence team. The lead counsel should also be made responsible for making a refund of any fees that were so given.

179. During the three-week period that I was at the Rwanda Tribunal I found no hard evidence that fee splitting had occurred, although it is very possible that such matters may go on, particularly where investigators are closely associated with suspects.

XXI. Late payment

180. While I was at the Rwanda Tribunal complaints were made to me about late payment to members of the defence team of their fees, travel expenses and daily subsistence allowance. Counsel in particular complained about the length of time it took to get payment of their travel expenses, when approved by the Defence Counsel Management Section, which are often considerable. This should not be the case. Delay in payment of such disbursement mean that counsel may have to go into personal debt.

XXII. Future action

181. The Registrar and his team will wish to discuss the present report and decide what future action needs to be taken. If they require further information or comments from me I will be pleased to assist.

182. I consider that when these discussions have taken place and a course of action agreed, new systems will have to be set up and amendments will have to be made to the directive.

183. Any new system will require to be drafted in detail. It should then be approved by the Presidents and Registrars of the Tribunals.

184. If there are to be savings in legal defence costs it is essential that current hours related systems be abolished.

185. The amount of money being paid to the legal aid counsel is far too high. Counsel claiming 175 hours a month receive $231,000 per year. In addition to this they have their reading fees for each stage of the trial, their reading fee for the history of Rwanda, the daily subsistence allowance, travel expenses and office facilities.

Annex II

Remuneration of defence team members under the legal aid programme of the International Criminal Tribunal for Rwanda

Manual for practitioners[a]

The present manual is intended — for the benefit of defence team members (and especially lead counsel) — to set out comprehensively:

(a) Which activities performed by defence team members will be remunerated under the Tribunal's legal aid programme;

(b) Which expenditures incurred by defence team members will be reimbursed under the Tribunal's legal aid programme;

(c) Which forms are required to be completed when claims for payment — whether for duties performed or reimbursement of expenditures — from the Tribunal's legal aid programme are submitted and the time limits for submitting such claims;

(d) Which proofs of expenditures incurred are required to be submitted with claims for reimbursement thereof.

A. Activities which may be remunerated

1. Once a Tribunal detainee has been accepted by the Registrar as having insufficient financial means to pay (whether in whole or in part) for his or her own defence the detainee is assigned a lead counsel from the approved list maintained by the Registrar.

2. That lead counsel, once assigned, is expected to meet with his or her client at the seat of the Tribunal in Arusha and commence the preparation of his client's defence strategy, both as to the facts alleged by the Prosecutor and as to the applicable law.

3. To assist him or her, during both case preparation and substantive trial proceedings, the lead counsel may request the Defence Counsel Management Section to approve the appointment of both legal assistants and investigators (up to three individuals in total, that is, either two legal assistants and one investigator or two investigators and one legal assistant). Lead counsel may also request the appointment of a co-counsel (it should be noted that particular restrictions are imposed on the work for which co-counsel will be remunerated — see below for details).

[a] Issued in July 2003 by the Defence Counsel Management Section. This document is a compendium of the "Guidelines for settlement of defence accounts" of 1 September 1998, the circular of 13 September 2000 reviewing the measures relative to the enforcement of the directive on the assignment of defence counsel, and the circular of 26 January 2001 regulating the assignment of co-counsel under the legal aid programme of the Tribunal. It will be updated/modified from time to time with the latest version being available on the Tribunal web site (www.ictr.org). Suggestions for improvement are welcome.

4. For the purposes of the Tribunal's legal aid system the various stages of proceedings are distinguished thus (clearly, depending on the outcome of the proceedings not all stages may be applicable). Different amounts are potentially claimable by different members of the defence teams at each stage:

(a) Preparation for trial (or pre-trial);

(b) In-trial (or substantive trial proceedings);

(c) Sentencing proceedings;

(d) Appeal proceedings;

(e) Review proceedings.

Preliminary points to note

5. The precondition for payment of fees and expenses is that such are agreed by the Registrar as being both necessary and reasonable (article 17 of the Directive on the Assignment of Defence Counsel) for the conduct of the accused's defence. In addition, the statement of fees submitted by the counsel must be in conformity with article 24 of the directive. Thus, it must clearly indicate:

(a) The name(s) of the suspect or accused;

(b) The registration number in the record book;

(c) The present stage of the procedure;

(d) The date on which the work was carried out;

(e) The time spent;

(f) The nature of the activity performed, including sufficient information to evidence the necessity and reasonableness for the preparation of the case as stipulated by article 17 of the directive. The form entitled "Request of payment of fees and reimbursement of expenses" must be submitted together with the statement of fees.

6. The lead counsel is responsible for the case and thus for the claims of all members of his team, whether for work performed or for expenses. He must ensure that the team functions as such and that the members of the team complement each other and do not duplicate work.

7. Working sessions between team members can also be remunerated when the time spent has been shown by the lead counsel to be reasonable and necessary. Meetings with third parties, such as potential witnesses, should be limited, as far as possible, to one team member. Meetings attended by more than one member of the team with a third party may however be remunerated when the lead counsel has shown the necessity and reasonableness thereof. Other restrictions on payment, additional to the essential precondition set out above, also apply, as set out below.

1. At the pre-trial stage

Lead counsel

8. In each calendar month the lead counsel may be remunerated for a maximum of 175 billable hours worked. (Some counsel in practice choose to devote greater

numbers of hours to their work in the knowledge that such cannot be reimbursed.) The hourly rate covers time spent in the direct preparation of the case and any court appearances. Direct preparation is understood, for example, to mean preparation of a motion, close study of a prosecution witness statement or taking a statement from a defence witness. More general study/preparation, such as may be necessary to master the relevant case, treaty and Tribunal law is not remunerated as all counsel who have requested registration on the Tribunal's approved list are assumed thereby to hold themselves out as learned in all aspects of the law applicable in the Tribunal. The hourly rate applicable to lead counsel is commensurate with their years of experience, as follows:

(a) From 10 to 14 years of experience — $90 per hour;

(b) From 15 to 19 years of experience — $100 per hour;

(c) More than 20 years of experience — $110 per hour.

9. Co-counsel (if appointment of such has been duly authorized) may be remunerated for up to a total maximum of 250 billable hours as follows:

(a) Reading the general history of Rwanda — maximum 50 hours

(b) Reading the case file of the accused — maximum 200 hours.

10. After this familiarization period, the cost of co-counsel's representation shall be remunerated under the legal assistance programme only following the commencement of the substantive trial proceedings. For the avoidance of doubt, it should be noted that co-counsel are paid at the hourly rate of $80 (that is, irrespective of seniority in practice) with a maximum of 175 billable hours per month.

Engagement of legal assistants/investigators

11. Counsel must seek, using the form entitled "Request for an assistant/investigator", written authorization from the Registrar prior to the recruitment of a legal assistant or an investigator. Such a request should provide reasons and include inter alia, the specific assignment for which the person is recruited as well as the estimated time of duration of the work. Thus, at the pre-trial stage a request for the appointment of investigators/legal assistants should have as a prerequisite the submission of a defence plan of action.

12. The remuneration for an assistant or an investigator is a flat hourly rate of $25, within an overall maximum of 100 billable hours per calendar month. The flat hourly rate covers time spent in the direct preparation of the case. Additional study and research that is not linked to the direct preparation of the case is not separately remunerable.

2. At the trial stage

13. Lead counsel and co-counsel may each be remunerated in each calendar month for a maximum of 175 billable hours worked at their respective fixed hourly rate. The hours charged should be those spent in the direct preparation of the case, and conduct of the case before the Trial Chamber.

14. Assistants and investigators may be remunerated at the flat hourly rate of $25, with a maximum of 100 billable hours per month. The flat hourly rate remunerates time spent in the direct preparation of the case.

3. At the appeal stage

15. The lead counsel may be remunerated in each calendar month for a maximum of 175 billable hours worked.

16. A co-counsel will not be allowed automatically at the appeal stage. The lead counsel must re-apply for the assistance of co-counsel giving the reasons why such an appointment is necessary for the conduct of the appeal.

17. In the event of a co-counsel being reassigned for the appeal he or she might normally expect to be remunerated for an overall maximum of 350 hours work. However, hours additional to these 350 hours may be remunerated in the event that the Registrar is persuaded that such additional hours are reasonable and necessary in all the circumstances of the case. Application for an allotment of time for co-counsel greater than the standard 350 hours must be made prior to those hours being worked, otherwise remuneration cannot be expected.

18. Similarly, during the appeal phase, one legal assistant and one investigator may again be assigned if the request submitted by lead counsel is considered justified by the Registrar. Such request must include, inter alia, the specific assignment for which the person is recruited as well as a workplan, including time estimates. Again, a maximum of 100 billable hours in each calendar month is permitted in respect of each legal assistant/investigator appointed.

B. Expenditures which may be reimbursed

19. Where Counsel has been assigned, the costs and expenses related to legal representation necessarily and reasonably incurred are met by the legal aid programme, subject to availability of funds, applicable United Nations rules and regulations and compliance with the procedures established by the Registrar.

20. Such costs and expenses (that is, as distinct from remuneration for work done, as set out in section A above) shall include: costs related to travel for hearing or investigation purposes; measures taken for the production of evidence to assist or support the defence; expenses for the ascertainment of facts; consultancy and expert opinion; translation of documents to be filed before the Tribunal by external translators (see "Guidelines on the remuneration of external translators/self-revisers for the International Criminal Tribunal for Rwanda"), transportation and accommodation of witnesses; registration/visa fees, taxes or similar duties.

21. Written authorization from the Registrar shall be obtained prior to any official travel. Requests should be made using the form entitled "Work schedule", and be submitted a minimum of one month prior to the proposed commencement of travel to allow for adequate assessment and processing by the Defence Counsel Management Section. In accordance with article 27 of the Directive on the Assignment of Defence Counsel travel expenses are reimbursed on the basis of one economy class round-trip air ticket by the shortest available route. Necessary travel by train or car can also be reimbursed at applicable United Nations rates.

22. A daily subsistence allowance is paid (at a rate which varies in relation to the city where the mission is carried out) every time a defence team member carries out a mission out of his place of residence with the prior approval of the Registry. When the mission of the defence team member outside his place of residence lasts more than two weeks, a provisional payment of the daily subsistence allowance may be paid. Request for advance of daily subsistence allowance should be made using the form entitled "Request for advance DSA".

23. During the pre-trial phase, either the lead counsel or the co-counsel shall be allowed to travel for in-court proceedings such as the hearing of preliminary motions, in the event that the trial chamber requires her or his presence (most such decisions are now rendered on the basis of written submissions, rather than in-court oral argument). Other than for such proceedings Counsel shall be reimbursed, in principle, the cost of travel to Arusha on a maximum of three occasions, prior to the commencement of the substantive trial.

24. During the pre-trial stage, the lead counsel may convene up to two coordination meetings with all members of the team in Arusha if the Registrar considers the request is justified.

C. Required forms, formalities and time limits

25. The United Nations financial rules require that all requests for payment of fees for work done or for reimbursement of expenses be submitted with an original signature on the form entitled "Request for payment of fees and/or reimbursement of expenses", which is available on the Tribunal's web site. A signature is treated as original if on a document received by fax, through the post or by DHL delivery service. Currently, an e-mailed document cannot, under United Nations rules, be accepted as an original signature. However, once the original claim has been submitted with the lead counsel's signature, the Defence Counsel Management Section may make inquiries of the lead counsel and receive answers to such inquiries via e-mail in an effort to reduce administrative delays. Lead counsel are therefore requested to ensure that their office checks e-mail daily in case of communications of this nature from the Defence Counsel Management Section.

26. The statement of fees/expenses claimed must be submitted in respect of work done/expenses incurred by all defence team members on a monthly basis no later than one calendar month following the month in respect of which the claim is being submitted. Thus, for example, for all work done by all defence team members between 1 and 31 January, the consolidated claim must be submitted under the lead counsel's signature no later than (and preferably well before) 28 February. It must be sufficiently detailed so as to enable the Registry to assess the necessity and the reasonableness of each activity charged by each of the defence team members. Claims for fees/expenses will not be processed unless such are received comprehensively in respect of all defence team members for the month in question.

27. The lead counsel must, by his or her own signature, certify all requests for payments of fees or reimbursement of expenses in respect of all his or her defence team members.

The Defence Counsel Management Section office procedure

28. The statement of fees and/or expenses as submitted by the lead counsel each month is reviewed by the Defence Counsel Management Section. It is then submitted to the Finance Section of the Tribunal for processing with the Defence Counsel Management Section indications as to which items should be remunerated/reimbursed as being "reasonable and necessarily". Frequently, however, the Defence Counsel Management Section considers some claims or part thereof to be unacceptable or at best as requiring further and better particulars by way of justification. In such cases, the Section may return a copy of the submitted claim to the lead counsel concerned with a note particularizing the disallowed portion or drawing attention to the further particulars required. Reference may be made by the Defence Counsel Management Section to the list of standard abbreviations, informing lead counsel, where applicable, of the grounds on which additional justification is required, payment is disallowed, hours claimed reduced, etc. A copy of the reviewed statement is sent to lead counsel (normally this will be by e-mail unless the counsel has stated a preference for fax) for his information, for his dispatching to the relevant team member and in case the lead counsel should wish to submit to the Defence Counsel Management Section a request for reconsideration.

29. In the latter case, such reasoned requests for reconsideration should be submitted no later than 10 working days from the date on which the reviewed statement has been returned to lead counsel by the Section. If no request for reconsideration has been received at the Section within that time the Section (if it has not already done so) will forward the claim — as already revised and approved by the Section — to the Finance Section for payment. It follows that any request for reconsideration received after the revised claim has been submitted to the Finance Section will not be given the priority which the Section seeks to apply to claims delivered within the timescale herein set out. Assistance should be provided to the Section to reduce administrative delays by submitting claims in accordance with the time limits. Even if no work has been done by any defence team member in a particular month, the lead counsel should submit a nil return in the form entitled "Request for payment of fees and/or reimbursement of expenses" at the beginning of the following calendar month to enable the Section to maintain its ongoing record of expenditure.

30. Requests for payment of fees and reimbursement of expenses must be submitted on a monthly basis. Failure to comply with this requirement may result in non-payment.

D. Proofs of expenditure required

31. For all requests for reimbursement of expenses the following must be submitted with any claims:

(a) Copies of work schedules (as previously approved by the Defence Counsel Management Section) for all daily subsistence allowance claims;

(b) Original air/train/bus/boat tickets used;

(c) Original receipts for ticket purchases;

(d) Original boarding passes;

(e) Copies of relevant passport pages for proof of entry and exit, with the relevant stamps highlighted.

32. As United Nations rules require the production of original documentation for items (b), (c) and (d) above, it follows that e-mail attachments may not be used for these documents. Ordinary mail or DHL must be used for their transmission to the Section. Nevertheless, the lead counsel is advised to ensure his or her office retains photocopies of all such documentation submitted.